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In the Supreme Court of the United States

OCTOBER TERM, 1979

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,
APPELLANTS

v.

STAR COAL COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

JURISDICTIONAL STATEMENT

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v.

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JURISDICTIONAL STATEMENT

QUESTION PRESENTED

Whether Section 518(c) of the Surface Mining Control and Reclamation Act of 1977 violates the Due Process Clause of the Fifth Amendment by requiring that proposed civil penalties be paid into an interest-bearing escrow account before full administrative review of such proposed penalties may be obtained.

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*Other defendants below and petitioners here are the Director of the Office of Surface Mining, Reclamation and Enforcement, the Office of Surface Mining, Reclamation and Enforcement, the United States Department of the Interior and the United States of America.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	1
Statement	1
The question is substantial	3
Conclusion	4
Appendix A	1a
Appendix B	33a
Appendix C	35a
Appendix D	37a

TABLE OF AUTHORITIES

Cases:

Virginia Surface Mining and Reclamation Association v. *Andrus*, 483 F. Supp. 425, appeals pending, Nos. 79-1538, 79-1567, and 79-1596 ..... 1, 2, 3, 4

Constitution, statutes and regulations:

United States Constitution:

Article I, Section 8 1
Fifth Amendment 1, 2, 4
Tenth Amendment 2

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.* ... 1

Section 510(d), 30 U.S.C. (Supp. I) 1260(d) 3
Section 518, 30 U.S.C. (Supp. I) 1268.. 1, 2, 3, 4
Section 701(20), 30 U.S.C. (Supp. I) 701(20) 3

30 C.F.R. 716.7(d), 42 Fed. Reg. 62694 (1977). 3
30 C.F.R. 723.17, 42 Fed. Reg. 62703-62704 (1977)..... 2

OPINIONS BELOW

The opinion of the district court (App. A, *infra*, 1a–32a) is not yet reported. The ruling of the district court on the Secretary of the Interior's application for a stay (App. B, *infra*, 33a–34a) is not reported.

JURISDICTION

The district court's preliminary injunctive order was entered on February 13, 1980. The Secretary of the Interior filed a notice of appeal to this Court on March 13, 1980 (App. C, *infra*, 35a–36a). On May 3, 1980, Mr. Justice Blackmun extended the time within which to docket the appeal to and including July 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *McLucas* v. *DeChamplain*, 421 U.S. 21 (1975); *Fleming* v. *Rhodes*, 331 U.S. 100 (1947).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution and Section 518 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1268, are reprinted in App. D, *infra*, 37a–40a.

STATEMENT

Like *Virginia Surface Mining and Reclamation Association* v. *Andrus*, 483 F. Supp. 425 (W.D. Va. 1980), pending on appeals, Nos. 79–1538, 79–1567, and 79–1596, this case involves a broad constitutional challenge to numerous important provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.* The suit was filed in April 1979 in the United States District Court for the Southern District of Iowa. Plaintiff

Star Coal Company sought declaratory and injunctive relief against continued enforcement of the Surface Mining Act by the Secretary of the Interior. Like the mine operators in *Virginia Surface Mining*, Star Coal alleged that the Act (1) is beyond the scope of congressional power to regulate interstate commerce under Article I, Section 8 of the Constitution, (2) violates the Tenth Amendment by usurping the states' sovereign right to regulate land use, (3) takes private property without just compensation, in violation of the Fifth Amendment, (4) contravenes the equal protection principle in the Due Process Clause of the Fifth Amendment by regulating surface coal mining but not surface mining of other mineral deposits, and (5) denies coal mine operators due process of law in some of the enforcement measures designed by Congress (App. A, *infra*, 1a–2a).

On February 13, 1980, the district court rejected all but one of Star Coal's constitutional arguments in favor of preliminary injunctive relief. The court ruled that Star Coal had demonstrated a reasonable likelihood of success only with respect to its due process attack on the civil penalty provisions in Section 518 of the Act, 30 U.S.C. (Supp. I) 1268. In the court's view (App. A, *infra*, 21a–32a), mine operators cannot be required to pay proposed civil penalties into an interest-bearing escrow account as a precondition of obtaining full administrative review of such penalties. The court acknowledged that the Secretary, by regulation, has afforded mine operators an opportunity for an informal conference on proposed penalties before the amount of such penalties must be placed in escrow by operators seeking full administrative review. App. A, *infra*, 22a–23a; 30 C.F.R. 723.17, 42 Fed. Reg. 62703–62704 (1977). Nevertheless, the court announced its agreement with the holding in *Virginia Surface Mining* (79–1538 J.S. App. 67a–74a) that the "requirement of

prepayment of a civil penalty in order to gain a hearing does not afford sufficient due process to the mine operators" (App. A, *infra*, 23a). The court also found that "[t]here would be no adverse effects to the public or environment if enforcement of the provision requiring prepayment of civil penalties * * * were preliminarily enjoined" (*id.* at 24a). In this respect, the court stated (*id.* at 31a), "the balance of hardships tips decidedly in favor of Star Coal." Accordingly, the court enjoined the Secretary from enforcing the prepayment provisions in Section 518 of the Act during the pendency of this litigation (*id.* at 31a–32a).[1]

THE QUESTION IS SUBSTANTIAL

The question presented is identical to one of those presented in the Secretary's appeal from the district court's decision in *Virginia Surface Mining*. The civil penalty

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[1] In addition to Star Coal's constitutional challenges to the Surface Mining Act, the company also sought relief from a notice of violation issued to it on January 24, 1980, the final day of the district court's evidentiary hearing on the company's application for a preliminary injunction. This aspect of the litigation below is described in App. A, *infra*, 25a–30a. The notice of violation concerns Star Coal's alleged failure to submit a required reclamation plan before the commencement of surface mining operations on three tracts of "prime farmland," as that term is used in Section 510(d) and defined in Section 701(20) of the Act, 30 U.S.C. (Supp. I) 1260(d), 1291(20). See also 30 C.F.R. 716.7(d), 42 Fed. Reg. 62694 (1977). Because Star Coal undertook this mining operation after receiving a permit to do so from the Iowa state regulatory authority responsible for surface mining, the district court concluded that the Secretary's proper remedy lies against the permit-issuing authority and not against the mine operator. Moreover, the court determined that enforcement of the notice of violation and cessation order would cause serious economic injury to Star Coal and that, on the other hand, continuation of the mining operation in question during this litigation would not cause significant environmental harm. The court therefore preliminarily enjoined the Secretary from enforcing the disputed notice of violation. The present appeal does not involve this aspect of the decision below.

provisions in Section 518 of the Surface Mining Act are critical to the effective enforcement of the Act's regulatory provisions, and, for the reasons stated in 79–1538 J.S. 31–34, the prepayment feature of those provisions does not violate the Due Process Clause. The district court therefore erred in ruling Section 518 unconstitutional and enjoining its enforcement.

CONCLUSION

Probable jurisdiction should be noted. Alternatively, because the present appeal raises only one of the several issues presented in *Virginia Surface Mining*, the Court should hold this case and dispose of it in light of the disposition in *Virginia Surface Mining*.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JULY 1980

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

No. 79-171-2

STAR COAL CO., PLAINTIFF

v.

CECIL D. ANDRUS, ET AL., DEFENDANTS

RULING ON MOTION FOR PRELIMINARY INJUNCTION AND ORDER

Plaintiff Star Coal Co. is an Iowa corporation engaged in surface coal mining in the Southern District of Iowa. On April 18, 1979, Star Coal filed a complaint in this court against the Secretary of the Interior, the Director of the Office of Surface Mining, Reclamation and Enforcement, the Office of Surface Mining, Reclamation and Enforcement, the United States Department of Interior and the United States of America. Star Coal seeks declaratory and injunctive relief to prevent the Secretary of the Interior from enforcing the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 et seq. (hereinafter referred to as "Surface Mining Act" or "Act") against it on the ground that the Act is unconstitutional. In its complaint, Star Coal alleges that Congress was not authorized by the commerce clause or any other provision of the Constitution of the United States to enact the Surface Mining Act and that the Act does not have a rational basis, that

the Act contravenes the Tenth Amendment to the Constitution by infringing upon the sovereign rights of the states to regulate land use, that the Act constitutes a taking of private property without just compensation in violation of the Fifth Amendment to the Constitution, that the Act violates substantive due process, and that certain enforcement provisions of the Act violate the procedural due process requirement of the Fifth Amendment to the Constitution. By a supplemental motion for the appointment of receiver, Star Coal also alleges that the Act's imposition of a reclamation fee in the amount of $.35 per ton for each surface mined ton of coal is an unconstitutional bill of attainder.

Star Coal also filed a motion for preliminary injunction seeking to have this court enjoin defendants from enforcing the Act during the pendency of this litigation on the same constitutional grounds urged in support of its prayer for permanent relief. On the 3rd, 4th, 7th, 21st, 22nd, 23rd and 24th days of January, 1980, this court held an evidentiary hearing on plaintiff's motion for a preliminary injunction, during which both parties introduced extensive evidence.

On January 28, 1980, in response to a motion for an emergency temporary restraining order filed by Star Coal and upon notice to defendants and hearing, this court entered an order temporarily restraining defendants from enforcing in any manner whatsoever Violation No. 1. of Notice of Violation No. N80-4-1-1 issued to Star Coal on January 24, 1980, by Michael C. Wolfrom, District Manager for the Kansas City Office of Inspection and Enforcement of the Surface Mining Office, the temporary restraining order to remain in effect until the filing of this ruling on plaintiff's application for issuance of a preliminary injunction. The facts underlying the issuance of the

temporary restraining order and the reasons for its issuance are fully set forth in the temporary restraining order entered on January 29, 1980.

THE SURFACE MINING ACT

> The Surface Mining Act is a comprehensive statute designed, through interim and permanent measures, to establish nation-wide, uniform regulations for surface coal mining operations in cooperation with the states. The Secretary of the Interior, acting through the Office of Surface Mining Reclamation and En forcement, is charged with the primary responsibility of administering and implementing the Act by promulgating regulations and enforcing its provisions. The performance standards required by the Act during the interim phase now in effect include: requirements for restoration of land of its prior condition [including prime farm land to prime farm land], restoration of land to approximate original contour, segregation and stabilization of top soil, minimizing disturbances to hydrologic balance and to water quality, the construction of coal mine waste piles used as dams and embankments, the use of explosives, revegetation of mined areas, and spoil disposal for steep slope mines.

Virginia Surface Mining & Reclamation Ass'n, Inc. v. Andrus, 604 F.2d 312, 314 (4th Cir. 1979) (footnote omitted).

In enacting the Surface Mining Act, the Congress found and declared that:

> (a) extraction of coal and other minerals from the earth can be accomplished by various methods of mining, including surface mining;
>
> (b) coal mining operations presently contribute significantly to the Nation's energy requirements; surface coal mining constitutes one method of extraction of the resource; the overwhelming percentage of the Nation's coal reserves can only be extracted by un-

derground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry;

(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources;

(d) the expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public.

(e) surface mining and reclamation technology are now developed so that effective and reasonable regulation of surface coal mining operations by the States and by the Federal Government in accordance with the requirements of this Act is an appropriate and necessary means to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations;

(f) because of the diversity of terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States;

(g) surface mining and reclamation standards are essential in order to insure that competition in in-

terstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders;

(h) there are a substantial number of acres of land throughout major regions of the United States disturbed by surface and underground coal on which little or no reclamation was conducted, and the impacts from these unreclaimed lands impose social and economic costs on residents in nearby and adjoining areas as well as continuing to impair environmental quality;

(i) while there is a need to regulate surface mining operations for minerals other than coal, more data and analyses are needed to serve as a basis for effective and reasonable regulation of such operations;

(j) surface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security, and general welfare of the Nation and should be conducted in an environmentally sound manner; and

(k) the cooperative effort established by this Act is necessary to prevent or mitigate adverse environmental effects of present and future surface coal mining operations.

Section 101 of the Act, 30 U.S.C. § 1201.

It is the purpose of this Act to—

(a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;

(b) assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations;

(c) assure that surface mining operations are not conducted where reclamation as required by this Act is not feasible;

(d) assure that surface coal mining operations are so conducted as to protect the environment;

(e) assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations;

(f) assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy;

(g) assist the States in developing and implementing a program to achieve the purposes of this Act;

(h) promote the reclamation of mined areas left without adequate reclamation prior to the enactment of this Act and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public;

(i) assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this Act;

(j) provide a means for development of the data and analyses necessary to establish effective and reasonable regulation or surface mining operations for other minerals;

(k) encourage the full utilization of coal resources through the development and application of underground extraction technologies;

(l) stimulate, sponsor, provide for and/or supplement present programs for the conduct of research investigations, experiments, and demonstrations, in the exploration, extraction, processing, development, and production of minerals and the training of mineral engineers and scientists in the field of mining, miner-

als resources, and technology, and the establishment of an appropriate research and training center in various States; and

(m) wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.

Section 102 of the Act, 30 U.S.C. § 1202.

The interim regulations now in effect were promulgated and published on December 13, 1977. 42 Fed. Reg. 62639. Pursuant to the provisions of section 526(a)(1), review of these regulations took place in the United States District Court for the District of Columbia, and they were upheld. *In re Surface Mining Regulation Litigation*, 452 F. Supp. 327 (D.D.C. 1978), and 456 F. Supp. 1301 (D.D.C. 1978). Appeal of the case is now pending. *Atlantic Richfield Co.* v. *United States Dep't of the Interior*, (In Re Surface Mining Regulation Litigation), D.C. Cir. Nos. 78–2190, 78–2191 and 78–2192.

The Surface Mining Act provides that surface coal mining operations on lands regulated by a state commencing on or after February 3, 1978 (new mines), must comply with the requirements of the interim program when operations start. Section 502(b), 30 U.S.C. § 1252(b). Surface coal mining operations which commenced prior to February 3, 1978, other than by "small operators," were to comply with the requirements of the interim program by May 3, 1978, and "small operators" by January 1, 1979. Section 502(c), 30 U.S.C. § 1252(c).

During the interim program, the Secretary of the states share joint responsibility for enforcement of the regulatory program. A state may continue to issue permits, which are to contain terms requiring compliance with section 502(c) performance standards. Section 502(b), 30

U.S.C. § 1252(b). By February 3, 1978, the Secretary was required to implement a federal enforcement and inspection program in each state. Section 502(e), 30 U.S.C. § 1252(e). This enforcement and inspection program requires, among other things, an inspection of each surface coal mine by a federal inspector at least once every six months, and is intended to supplement existing state enforcement programs during the interim program. The interim regulatory program will remain in effect in a particular state until that state has had its current program approved pursuant to section 503, 30 U.S.C. § 1253, or until a federal program has been implemented pursuant to section 504, 30 U.S.C. § 1254.

The second phase of the regulatory program—the permanent program—is provided for in section 501(b), 30 U.S.C. § 1251(b). That section requires the Secretary to promulgate within one year of enactment (August 3, 1978), regulations setting forth a "permanent regulatory program," which program establishes procedures and requirements for preparation, submission and approval of permanent state programs and for implementation of federal programs only in the event a state does not implement a program meeting the requirements of the Surface Mining Act. The states are not required to develop or to implement state programs. *See* sections 503 and 504, 30 U.S.C. §§ 1253 and 1254. These regulations require compliance with the full range of requirements of Title V, including all the performance standards set forth in section 515 of the Act, not just those applicable to the interim program. The permanent program is not yet in effect.

JURISDICTION

Before the court can consider granting a preliminary injunction, it must be established that the court has juris-

diction over the matter. This action is a direct constitutional challenge to certain provisions of the Surface Mining Act, and jurisdiction is predicated on 28 U.S.C. § 1331(a).

Defendant contends that the court lacks jurisdiction because Star Coal has not exhausted administrative remedies. However, this is not a case in which (1) it is desirable for the agency to develop a factual background upon which decisions should be based; or (2) the issues involve the exercise of agency discretion or expertise; or (3) judicial or administrative efficiency could be promoted by allowing plaintiff to vindicate its rights in the administrative process. *See McKart* v. *United States*, 395 U.S. 185, 193–95 (1968). There is no need to exhaust administrative remedies in this case because neither administrative law judges nor review boards have jurisdiction to decide the constitutional issues raised. *Virginia Surface Mining & Reclamation Ass'n, Inc.* v. *Andrus*, No. 78–0224–B (W.D. Va. Jan. 3, 1980). *See also Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *Johnson* v. *Robison*, 415 U.S. 361, 368 (1974).

Furthermore, the court finds that the constitutional issues are ripe for challenge since Star Coal is presently aggrieved by operations of the Act. *Virginia Surface Mining & Reclamation Ass'n, Inc. v. Andrus*, *supra* (district court opinion); *see also Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 81–21 (1978).

PRELIMINARY INJUNCTION STANDARDS

Section 526(c) of the Act, 30 U.S.C. § 1276(c), establishes the following standards for temporarily enjoining any order or decision of the Secretary:

> (1) all parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;

(2) the person requesting such relief shows that there is substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and

(3) such relief will not adversely affect the public health or safety or cause significant environmental harm to land, air, or water resources.

The United States Court of Appeals for the Fourth Circuit has held that the foregoing statutory standards reflect a congressional policy which should be applied in cases such as this where the plaintiff seeks to enjoin the Secretary from issuing any orders or decisions. *Virginia Surface Mining & Reclamation Ass'n, Inc.* v. *Andrus, supra,* 605 F.2d at 315. The Fourth Circuit reached its conclusion under the following principles expressed in *Yakus* v. *United States,* 321 U.S. 414, 440–42 (1944), a case that dealt with the constitutionality of the Emergency Price Control Act of 1942:

> [W]here an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff * * *. This is but another complication of the principle * * * that "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."
>
> Here, in the exercise of the power to protect the national economy from the disruptive influences of inflation in time of war Congress has seen fit to postpose injunctions restraining the operations of price regulations until their lawfulness could be asscertained by an appropriate and expeditious procedure. In so doing it has done only what a court of equity

> could have done, in the exercise of its discretion to protect the public interest. * * * The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions.

The United States Court of Appeals for the Eighth Circuit, in respect to issuance of preliminary injunctions generally,

> has apparently adopted two alternative preliminary injunction tests: the familiar traditional test, *e.g.*, *Minnesota Bearing Co.* v. *White Motor Corp.*, 470 F.2d 1323, 1326 (8th Cir. 1973), and the test formulated by the Second Circuit, *e.g.*, Gresham v. *Chambers*, 501 F.2d 687, 691 (2d Cir. 1974); *accord*, *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975). *See Dakota Wholesale Liquor, Inc.* v. *Minnesota*, 584 F.2d 847, 849 & n.4 (8th Cir. 1978) (per curiam); *Fennell* v. *Butler*, 570 F.2d 263, 264 (8th Cir.), *cert. denied*, 437 U.S. 906, 98 S.Ct. 3093, 57 L.Ed.2d 1136 (1978). The traditional test requires the moving party to show substantial probability of success on the merits and the possibility of irreparable injury if injunctive relief is denied. *Fennell* v. *Butler*, *supra*, 570 F.2d at 264. Other factors which may be considered include possible harm to other interested parties and the public interest. *Minnesota Bearing Co.* v. *White Motor Corp.*, *supra*, 470 F.2d at 1326 (citation omitted). Under the slightly different Second Circuit test, the moving party must show there are sufficiently serious questions going to the merits to make the questions a fair basis for litigation and a balance of the hardships tipping decidedly in the party's favor. *Id.* Under both tests the district court must examine the merits and the nature of the possible injury suffered by either or both of the parties.

Minnesota Ass'n of Health Care Facilities, Inc. v. *Minnesota Dep't of Public Welfare*, 602 F.2d 150, 152 (8th Cir. 1979).

The Eighth Circuit has expressly recognized as appropriate for consideration the potential impact of a preliminary injunction upon the public welfare. *Young* v. *Harris*, 599 F.2d 870, 879 (8th Cir. 1979); *Minnesota Bearing Co.* v. *White Motor Corp.*, 470 F.2d 1323, 1326 (8th Cir. 1973).

I am of the tentative opinion that the Fourth Circuit correctly held that the Surface Mining Act's statutory standards for enjoining an order or decision issued by the Secretary are also applicable to situations where a party seeks to enjoin the Secretary from issuing any orders or decisions. However, it need not now be decided whether the Act's standards or the Eighth Circuit's general standards apply, because in respect to each issue either both standards are met or neither is met.

NOTICE AND HEARING

All parties to the proceedings have been notified and given an opportunity to be heard, as required by section 526(c)(1) of the Act, 30 U.S.C. § 1276(c)(1), and all parties were heard and introduced extensive evidence.

PROBABLE SUCCESS ON MERITS

Section 526(c)(2) of the Act, 30 U.S.C. § 1276(c)(2), requires the party requesting injunctive relief to show a "substantial likelihood that he will prevail on the merits," a standard that is substantially identical to the Eighth Circuit's traditional requirement that the moving party show "substantial probability of success on the merits." Except for the procedural due process challenge to the requirement of prepayment into escrow of a civil penalty as a condition of gaining a hearing and the matter of Violation No. 1 of Notice of Violation No. N80-4-1-1, Star Coal has failed to make this required showing.

The Commerce Clause

Defendant's first argument is a broad-scale attack on the Act as being beyond the constitutional authority of Congress to regulate interstate commerce.

In section 101(c), (g) and (j) of the Act, 30 U.S.C. § 1201(c), (g) and (j), Congress sets out the finding that surface mining burdens and affects interstate commerce. (See text at p. 4, *supra*). This finding of Congress is supported by the legislative history. Much of the coal which is surface mined as well as the agricultural products grown on prime farm land travel in interstate commerce. As United States District Judge Glen M. Williams found:

> Surface mining of coal in the United States may involve the temporary or permanent degradation of vast tracts of lands, a problem greatly magnified by developing mining technologies. If the land is not reclaimed in a manner that subjects it to further use, then the productivity of the land is lost to present as well as future generations, reducing the flow of other valuable items in interstate commerce.

Virginia Surface Mining & Reclamation Ass'n, Inc. v. *Andrus*, *supra*, slip op. at 6. Judge Williams also found that the cumulative effects of stream pollution, floods, landslides, loss of aquatic habitats, erosion, and hydrological imbalances resulting from surface disturbances constitute a substantial impact on interstate commerce.

This court heard testimony that Star Coal's coal is sold in competition with coal produced in other states, notably Missouri and Illinois, and that Star Coal's principal customer, Iowa Electric, burns the coal to generate electricity, some of which is transferred directly or by displacement to out-of-state utility companies.

Even if Star Coal's coal were sold exclusively in Iowa and not in competition with out-of-state producers for Iowa markets, Congress would still be able to regulate its

surface mining activity if the cumulative effort of such activity affected interstate commerce. In *National League of Cities* v. *Usery*, 426 U.S. 833, 840 (1975), the Supreme Court stated:

> When considering the validity of asserted applications of this power to wholly private activity, the Court has made it clear that "even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." *Fry* v. *United States*, 421 U.S. 542, 547 (1975).

Thus, Congress' finding that the cumulative effects of the disturbances to the surface involved in surface mining burden interstate commerce enables it to regulate even local coal mining activities.

In *Virginia Surface Mining & Reclamation Ass'n, Inc.* v. *Andrus, supra*, the district court held the Surface Mining Act to be within the commerce clause power of Congress.

Star Coal has failed to demonstrate that it will probably succeed on the merits of the commerce clause issue.

The Tenth Amendment

As a related but independent ground for challenging the constitutionality of the statute, plaintiff relies on the Tenth Amendment. Plaintiff contends that the Act invades a traditional area of state concern, the regulation of land use. Preliminarily, the court questions whether plaintiff has standing to raise this issue to the extent that it involves intergovernmental immunities and federal interference in the traditional functions of state government. *Tennessee Power Co.* v. *TVA*, 306 U.S. 118, 144 (1938). "[T]he States as States stand on a quite different footing from an individual or a corporation when challenging the

exercise of Congress' power to regulate commerce." *National League of Cities, supra*, 426 U.S. at 854. Although the merits were addressed by the United States District Court for the Western District of Virginia in *Virginia Surface Mining*, the state of Virginia was a party to that action; the state of Iowa has not joined this action.

If the Tenth Amendment merits are reached, *National League of Cities* is distinguishable. Unlike the Fair Labor Standards Act, held unconstitutional when applied to the states in *National League of Cities*, the Surface Mining Act regulates private parties rather than the states themselves. As a result the Surface Mining Act does not purport to interfere with attributes of state sovereignty which were directly regulated by the Fair Labor Standards Act in *National League of Cities*. Furthermore, once the statute regulating private activity is found to be within the scope of the commerce clause, it is irrelevant that it preempts an area over which the state had previously exercised police power. "It is no objection to the exercise of the power of a state." *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 582 (1942). I am not persuaded by Judge Williams' reasoning and holding in *Virginia Surface Mining & Reclamation Ass'n, Inc.* v. *Andrus*, *supra*, that the Act contravenes the Tenth Amendment.

Star Coal has failed to demonstrate that it will probably succeed on the merits of the Tenth Amendment issue.

Fifth Amendment "Taking"

Star coal contends that the Act as applied to it constitutes a taking in violation of due process in two respects: (1) by the reclamation requirements imposed by Title V, sections 501 et seq. of the Act, 30 U.S.C. §§ 1251 et seq., and (2) by the assessment of the fee of $.35 per ton on coal

surface mined under section 402 of the Act, 30 U.S.C. § 1232.

Government action need not deprive the land owner of an estate in fee to constitute a taking in violation of the Constitution. *Kaiser Aetna v. United States*, ____ U.S. ____, 48 U.S.L.W. 4045 (Dec. 4, 1979). If a regulation is too burdensome on the property owner, it can constitute an unconstitutional taking of the property. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). However, legislation directed at a public purpose which limits the use of land in a reasonable manner and is not unduly burdensome on the property owner has been consistently held to be constitutional by the United States Supreme Court. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Miller v. Schoene*, 276 U.S. 272 (1928).

Star Coal relies on *Pennsylvania Coal v. Mahon*, *supra*, in which the Supreme Court struck down a Pennsylvania statute which forbade the mining of coal in such a way as to cause the subsidence of certain structures and dwellings. The Court held that the legislation served no public purpose and instead was directed at a private purpose of benefiting principally those living in the dwelling, that the legislation deprived the coal mining company, which had originally owned the land in fee, of its reserved subsurface mineral rights, and that the legislation served no public purpose and instead was directed at a private purpose of benefiting principally those living in the dwelling, that the legislation deprived the coal mining company, which had originally owned the land in fee, of its reserved subsurface mineral rights, and that the legislation abrogated the right to contract by giving the house dweller more than he had bargained for while depriving the coal miner of his bargain. The instant case differs from *Pennsylvania Coal*.

First, the Surface Mining Act is directed at the public purpose of eliminating the spillover effects of surface mining which burden interstate commerce. Although the owner of the surface rights or his successor in interest may benefit from the Act, he is neither the sole nor the principal beneficiary; the principal beneficiary is the public. The Supreme Court has said, "where the public interest is involved preferment of that interest over the property interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." *Miller v. Schoene, supra*, 276 U.S. at 279–80. The same is true of the exercise of the commerce power. *United States v. Carolene Products Co.*, 304 U.S. 144, 147–48 (1938). By regulating the activity of stripmining, Congress intended to reduce the debilitating effects of the activity on land and water resources, which must be maintained if they are to continue to generate goods for interstate commerce.

Secondly, the Surface Mining Act does not appear to lay an unreasonably heavy burden on the surface coal miner. Congress made an express finding that "surface mining and reclamation technology are now developed so that effective and reasonable regulation of surface coal mining operations by the States and by the Federal Government in accordance with the requirements of this Act is an appropriate and necessary means to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations." Section 101(e) of the Act, 30 U.S.C. § 1201(e). Coal mining technology has progressed since the Supreme Court decided *Pennsylvania Coal* in 1922. Congress' findings suggest both the public interest and surface coal miners' rights can be accommodated under the Act. Although Star Coal introduced considerable testimony demonstrating that the Surface Min-

ing Act has made surface coal mining more expensive, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal v. Mahon*, *supra*, 260 U.S. at 413. A comparison of values before and after the challenged legislation was enacted is relevant but by no means conclusive. *Penn Central Transp. Co. v. City of New York*, *supra*, 438 U.S. at 124; *Goldblatt v. Hempstead*, *supra*, 369 U.S. at 594.

A third factor for the court to consider is whether the action is characterized as a physical invasion by government, *Causby v. United States*, 328 U.S. 256 (1946), or more properly as an interference "arising from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transp. Co. v. City of New York*, *supra*, 438 U.S. at 124. I am inclined to view the Surface Mining Act as the latter. *See generally* Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149 (1971).

Star Coal specifically challenges as an unconstitutional taking the requirement of section 510(d)(1), 30 U.S.C. §1260(d)(1), that permits to mine prime farm land be conditioned upon the operator demonstrating that he possesses the technological capability to restore the "mined area, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farm land in the surrounding area under equivalent levels of management and [that he] can meet the soil reconstruction standards in Section 515(b)(7)." Star Coal contends that this is a technologically impossible requirement to meet under the current state of the art and has introduced evidence to the effect that once stripped for mining, topsoil structure cannot be returned to its former state for at least 20 years. This evidence suggests that the regulatory agencies may

need to give this requirement a liberal construction in interpreting the reclamation standard in the context of the state of the art. However, the evidence presented does not establish that the requirements for reclaiming prime farm land are probably so burdensome as to constitute a taking in violation of due process. Furthermore, Congress specificially found as a legislative fact that "surface mining and reclamation technology are now developed so that effective and reasonable regulation * * * in accordance with the requirements of this Act [is appropriate]." 30 U.S.C. §1201(e).

Additionally, Star Coal specifically challenges section 402, 30 U.S.C. §1232, which subjects surface coal operators to a reclamation fee to be part of the Abandoned Mine Fund. This fee appears to be incident to a public program adjusting the benefits and burdens of economic life to promote the common good. The purpose of the Abandoned Mine Fund is to assess to the industry as a whole the social and environmental costs of past industry operations and to alleviate some of the burden those mining operations have placed on interstate commerce. *Cf. Usery v. Turner Elkhorn Mining*, 428 U.S. 1 (1976). Also, the fee is probably a valid exercise of Congress' taxing power under article I, section 8, clause 1 of the Constitution, as urged by defendants.

Star Coal has failed to meet its burden of showing that it will probably succeed on the merits in respect to its Fifth Amendment taking claim or its bill of attainder theory.

Substantive Due Process and Equal Protection

Star Coal contends that the Act violates equal protection and substantive due process by regulating surface coal miners and failing to regulate surface miners of other mineral deposits which it contends place as great a burden

on interstate commerce as does surface coal mining. Star Coal has not demonstrated that the surface mining of other minerals places as great a burden on interstate commerce as that of coal mining. Furthermore,

> [t]he fact that certain interests or persons are affected more than others does not render economic legislation unconstitutional. "[R]egulatory legislation affecting ordinary commercial transaction is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). *See Duke Power Co. v. Carolina Environmental Study Group*, [438 U.S. 59, 83 (1978)]; *New Orleans v. Duke's*, 427 U.S. 297, 306 (1976).

Virginia Surface Mining & Reclamation Ass'n, Inc. v. Andrus, *supra*, slip op. at 15 (footnote omitted).

In *Secretary of State v. Bradley*, 440 U.S. 93, 97 (1979), the Supreme Court said: "Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."

Star Coal has failed to demonstrate that there is no rational basis for distinguishing between surface mining of coal deposits and surface mining of other minerals.

Star Coal also contends that the levying of the Abandoned Mine Fund violates equal protection and substantive due process by assessing surface coal miners $.35 per ton and underground coal miners $.15 per ton. Section 402(a) of the Act, 30 U.S.C. §1232(a). This fee differential, however, appears to be rationally based on the finding by Congress that surface mining of coal puts a heavier burden on interstate commerce than does underground mining.

Star Coal has not established probable success on the merits on these issues.

Procedural Due Process

Star Coal contends that the enforcement procedures contained in the Surface Mining Act fail to comport with the due process guarantees of the Fifth Amendment. Specifically, Star Coal challenges the aspects of the Act's enforcement procedures which allow a cessation order to be issued by a field inspector without prior hearing, and the Act's requirement that civil penalties be prepaid into escrow to preserve the right to contest the violation or amount of the penalties.

The Act's enforcement provisions survived a procedural due process challenge in *In Re Surface Mining*, 456 F. Supp. 1301, 1319–21 (D.D.C. 1978), but failed to survive a similar challenge in *Virginia Surface Mining & Reclamation Ass'n, Inc. v. Andrus*, *supra* (district court opinion). The *Virginia Surface Mining* case is distinguishable because the evidence in that case which led Judge Williams to his conclusion showed gross abuses and overreaching on the part of the Office of Surface Mining personnel enforcing the Act in Virginia. Thus, it was the enforcement provisions of the Act *as applied* which were found unconstitutional by Judge Williams. In the instant case, there is no evidence that the Office of Surface Mining personnel serving this region are applying the enforcement provisions in an abusive or overreaching manner.

While due process generally requires notice and an opportunity to be heard incident to the deprivation of any property interest, in circumstances where an immediate threat is posed to the public health or safety, the hearing need not be afforded before the initial seizure of the property. *Matthews v. Eldridge*, 424 U.S. 319, 334–35 (1976);

Ewing v. Mytinger & Casselberry, 339 U.S. 594, 599 -600 (1950); *Sink v. Morton*, 529 F.2d 601, 604 (4th Cir. 1975). Following this line of cases, the United States District Court for the District of Columbia held in *In Re Surface Mining, supra*, that (1) the governmental interest in the case of cessation orders is similar to those interests that have been held to warrant deprivations prior to a hearing; (2) the use of cessation orders is limited to circumstances in which there is a need for prompt action; and (3) the Act provides adequate opportunity for a mine operator subject to a cessation order to be heard.

The holding in *In Re Surface Mining, supra*, appears sound, and in the absence of evidence showing gross abuse and overreaching in administering the enforcement provisions of the Act, such provisions appear to meet the requirements of procedural due process of law.

Star Coal has not established probable success on the merits on this phase of its procedural due process issue.

However, Star Coal has demonstrated a substantial likelihood that it will ultimately prevail on the merits of the issue of prepayment into escrow of civil penalties as a condition of right to a hearing.

According to section 518(a) of the Act, the Secretary is authorized to assess civil penalties for violations of the Act. Once the operator has been charged with a violation, the Secretary has 30 days to determine whether to assess a civil penalty, and to inform the operator of the amount of any proposed penalty. Before payment of the assessment, an operator is entitled to a conference at which he may present information pertaining to the violation and the amount of the penalty. 30 C.F.R. §723.17(a). The Office of Surface Mining may then recalculate the amount of the proposed assessment, or vacate the penalty entirely. Section 518(c) provides that within 30 days of notification of

the proposed assessment, an operator who wishes to challenge either the fact of the violation or the amount of the penalty, must tender the full amount of the proposed assessment into an escrow account. Upon deposit of the proposed penalty, the operator may request a hearing to review the proposed assessment to be conducted pursuant to 5 U.S.C. §554. Section 518(b), 30 U.S.C. §1268(b). An order issued by the Secretary in such a proceeding is subject to judicial review within 30 days after entry of the order. Section 526(a)(2), 30 U.S.C. §1276(a)(2). If the operator successfully challenges either the fact of the violation or the amount of the penalty, the Secretary must remit the assessment plus interest within 30 days. Section 518(c), 30 U.S.C. §1268(c).

Judge Williams found that this requirement of prepayment of a civil penalty in order to gain a hearing does not afford sufficient due process to the mine operators, *Virginia Surface Mining & Reclamation Ass'n, Inc. v. Andrus, supra,* slip op. at 37, and I agree. *See Fuentes v. Shevin,* 407 U.S. 67 (1972), and *Boddie v. Connecticut,* 401 U.S. 371 (1971). *Phillips v. Commissioner,* 283 U.S. 589 (1930), relied upon by the defendants, is distinguishable.

ADVERSE EFFECTS

Star Coal has also failed to demonstrate (except for the matter of Violation No. 1 of Notice of Violation No. N80–4–1–1 and the matter of prepayment into escrow of civil penalties as a condition of hearing) that the preliminary injunction it seeks would not adversely affect the public health or safety or cause significant imminent environmental harm to land, air or water resources. The broad sweep of the injunction sought would virtually free surface coal miners from the standards of the Act, and the public

health and safety and the land, air and water resources would be subject to the adverse effects recited by Congress in its findings, section 101(c) of the Act, 30 U.S.C. §1201(c). Evidence received in the hearing held by this court concerning past surface coal mining practices in this country supports the findings of Congress. (Fairness to Star Coal requires me to note that the evidence adduced at the hearing shows that Star Coal itself has an excellent past record of reclamation and environmental protection. Indeed, if all coal miners in the past had shared Star Coal's commendable concerns for the environment, Congress might not have deemed it necessary to enact such a thoroughly regulatory law as the Surface Mining Act.)

There would be no adverse effects to the public or environment if enforcement of the provision requiring prepayment of civil penalties into escrow as a condition of gaining a hearing were preliminarily enjoined.

POSSIBLE IRREPARABLE INJURY

As previously noted, irreparable injury is part of the Eighth Circuit's traditional preliminary injunction test.

Star Coal has failed to demonstrate (except for the matter of Violation No. 1 of Notice of Violation No. N80-4-1-1) that it will suffer possible irreparable injury if the preliminary injunction it seeks is not issued. The management and economic burdens of abiding by the provisions of the Act and regulations issued thereunder during the pendency of this litigation will not irreparably injure Star Coal.

EIGHTH CIRCUIT'S ALTERNATIVE TEST

As previously noted, the Eighth Circuit's alternative preliminary injunction test requires the moving party to show that there are sufficiently serious questions going to

the merits to make the questions a fair basis for litigation *and* a balance of the hardships tipping decidedly in the moving party's favor.

On all issues, Star Coal has made the showing of a fair basis for litigation; however, it has failed (except for the matter of Violation No. 1 of Notice of Violation No. N80–4–1–1 and the matter of prepayment into escow of civil penalties as a condition of hearing) to show a balance of the hardships tipping decidedly in its favor for the reasons set forth in the two preceeding sections of this ruling. Simply stated, all things considered result in the balance of hardships tipping decidedly in favor of the public interest and environmental concerns.

The prepayment into escrow of a civil penalty as a condition of gaining a hearing, however, is a matter in respect to which the balance of hardships tips decidedly in favor of Star Coal.

VIOLATION NO. 1

On January 29, 1980, after notice and evidentiary hearing at which Star Coal and defendants introduced evidence, this court temporarily restrained defendants from enforcing in any manner whatsoever Violation No. 1 of Notice of Violation No. N80–4–1–1 issued to Star Coal on January 24, 1980, by Michael C. Wolfrom, District Manager of the Kansas City Office of Inspection and Enforcement of the Surface Mining Office. Neither party has requested an opportunity to submit additional evidence on the issue, and the court perceives no need for additional evidence. This issue is separate from the constitutional issues discussed *supra*.

Fact

In September of 1979, the Division of Mines and Minerals of the Iowa Department of Soil Conservation, which is

the state regulatory authority for Iowa within the meaning of section 701(26) of the Act, 30 U.S.C. §1241(26), issued Mining Permit No. 4 to Star Coal authorizing Star Coal to mine certain lands covered by the permit in Monroe County, Iowa. Star Coal's application for the permit included a soil map which showed that the permit area contained a few small areas of prime farm land, and in all respects was proper in form and substance. In connection with the application for Permit No. 4, Marvin Ross, Director of the Mines and Minerals Division, inspected the site with James E. Huyser, President of Star Coal, and George Kasper, an owner of part of the land, and Mr. Ross determined that by reason of lack of adequate number of years of crop production on the land in past years that it was not subject to the prime farm land restoration requirements of the Surface Mining Act. Permit No. 4 was therefore issued without a plan for reclamation of the prime farm land soils. The "negative determination" that Mr. Ross made in connection with Permit No. 4 was not reflected in writing. Star Coal proceeded to mine under the authority of and in reliance upon Permit No. 4.

On the afternoon of January 24, 1980 the last day of the hearing on plaintiff's application for issuance of a preliminary injunction, Mr. Wolfrom visited the sites of plaintiff's mines near Lovilla, Monroe County, Iowa, and issued two violation notices, the first of which alleges that plaintiff has failed to submit a plan for restoration of prime farm land in Permit Area 4 in respect to Prime Farm Land Soil Units Nos. 131B, 1130 and 263, and orders immediate cessation of overburden removal, including soil, or other mining-related activities on Prime Farm Land Units Nos. 131B, 1130 and 263. The violation notice also requires submission of a plan for restoration of prime farm land to regulatory authority and Office of Surface Mining by February 25, 1980.

Jurisdiction

Defendants contend that Star Coal's failure to exhaust administrative remedies in respect to the issuance of the violation notice precludes relief in federal district court. Ordinarily, a miner cited with a violation would have to exhaust administrative remedies before going to court. However, this is not the ordinary violation situation. Star Coal is accused of a violation simply because it proceeded to mine under the authority of the permit issued to it by the governmental agency empowered by the Act to issue permits. Defendants' efforts to require Star Coal to cease mining do not arise from any wrongdoing of Star Coal, but from defendants' claim that the governmental agency that issued the permit should not have done so.

This case is very similar factually and legally to *Midland Coal Co. v. Andrus*, pending in the United States District Court, Central District of Illinois, Springfield Division, No. 79-1172, in which Judge J. Waldo Ackerman concluded that administrative remedies need not be exhausted as a prerequisite to federal district court jurisdiction. (Memorandum Order of Dec. 21, 1979.) The issue in the instant case, like in *Midland*, is whether under the law defendants can undertake enforcement action against a miner on the basis of defendants' assertion that the permit was incorrectly issued. It is a legal issue.

> It is well settled that ordinarily courts will not interfere with an agency until it has completed its action and that administrative remedies may be bypassed only if (1) the agency has clearly violated a right secured by statute or agency regulation, Leedom v. Kyne, 358 U.S. 184, 188–189, 79 S.Ct. 180, 3 L.Ed. 2d 210 (1958); Elmo Division of Drive-X Company v. Dixon, 121 U.S.App. D.C. 113, 348 F.2d 342, 346–347 (1965); (2) the issue involved is a strictly legal one not involving the agency's expertise or any fac-

> tual determinations, Jewel Companies, Inc. v. F.T.C., 432 F.2d 1155, 1159 (7th Cir. 1970); McKart v. United States, 395 U.S. 185, 197–199, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969)* * *.

Borden, Inc. v. FTC, 495 F.2d 785, 786–87 (7th Cir. 1974).

I am satisfied that the above quoted conditions for bypassing administrative remedies have been met, and therefore this court has jurisdiction over this matter.

Preliminary Injunction Standards

Preliminary injunction standards have previously been discussed. Again, it is not necessary to determine whether the Act's standards or the Eighth Circuit's general standards apply because I find that Star Coal has met both sets of standards.

Notice and Hearing

As noted previously, this requirement has been met.

Probable Success on Merits

Star Coal has demonstrated a substantial likelihood that it will ultimately prevail on the merits on the issue of the enforceability of Violation No. 1 of Notice of Violation No. N80–4–1–1, for the same reasons expressed by Judge Ackerman in issuing the preliminary injunction in *Midland Coal Co. v. Andrus, supra.* Under the Surface Mining Act, the states are responsible for issuing permits during the interim program. Section 502(b) of the Act, 30 U.S.C. §1252(b). Defendants reply upon the power of the Secretary under the Act to enforce the Act during the interim program by appropriate enforcement action, including actions against a permitee who is in violation of the Act or a permit condition. Star Coal, the permitee, is not in violation of a permit condition, and if there is a violation of the

Act it is a violation by the permit granting authority, not Star Coal. Star Coal is acting within the authority of a permit duly issued to it. As Judge Ackerman aptly observed in his memorandum order granting a preliminary injunction against the Secretary of Interior in *Midland:*

> This suit stems from the defendant's threat of enforcement action against the plaintiff notwithstanding the State's issuance of the permit based upon the contested exemption. Thus, the real dispute is between the Secretary of the Interior and the Illinois Department of Mines and Minerals. I believe it would be anomalous to allow the Secretary to undertake enforcement action against Midland when the company has taken all steps required of it under the federal law and the state regulatory authority charged with the permitting responsibility has issued the required permit.
>
> * * * My decision is based solely on the conclusion that once Congress and the Secretary empower the State with permitting responsibility, the Secretary is not free to ignore the State's determination and undertake enforcement actions based upon the belief the exemption was improvidently granted.
>
> * * * I find that Midland can use the permit issued by the Illinois Department of Mines and Minerals as a shield to halt such collateral efforts by the Secretary to overrule the Illinois Department's decision.

Midland Coal Co. v. Andrus, supra, slip op. at 9–10.

Adverse Effects

Star Coal has demonstrated that preliminary injunctive relief from enforcement of Violation No. 1 of Notice of Violation No. N80–4–1–1 will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air or water resources. Indeed, the only argument that might be made is that environmental harm might result in the form of lowered productivity

of a few acres of prime farm land in the Permit No. 4 area after the mining and reclamation is completed. Any such "environmental harm" would not be significant because the evidence shows that the total acres are so few and each area of prime farm land is so small and irregular in shape that it is not very feasible to crop it anyway. Any lowered productivity of these few acres is not significant.

Possible Irreparable Injury

Star Coal relied upon the issuance of Permit No. 4 and has begun mining under its authority, committing significant resources to the project. If Star Coal were now to be precluded from carrying out its Permit No. 4 mining project, or delayed in doing so while it develops a prime farm land reclamation plan to the satisfaction of defendants, it would suffer serious economic injury which cannot be repaired by ultimate success on the merits or by any other means.

Because of costs and uncertainties inherent in developing a prime farm land reclamation plan, Star Coal chose to exclude from its mining plans 17 acres of prime farm land. Had Star Coal been required in the first place to develop a prime farm land reclamation plan for the scattered few acres of prime farm land contained in the area covered by Permit No. 4, it might well have excluded those acres from the permitted area and developed a completely different plan for mining the rest of the area, or it might have chosen not to mine the area at all. The decision to mine or not mine is based on whether it must develop and carry out a prime farm land reclamation plan. Star Coal has made its business decision, developed its mining plan and commenced executing its mining plan in reliance upon the state permitting agency's decision that a prime farm land reclamation plan was not required. Obviously, a re-

versal of that decision at this late date, after Star Coal has developed its mining plan and commenced mining, would work serious economic injury on Star Coal.

Eighth Circuit's Alternative Test

The preceding observations concerning Violation No. 1 of Notice of Violation No. N80-4-1-1 also demonstrate that Star Coal has shown that there are sufficiently serious questions going to the merits to make the questions a fair basis for litigation and a balance of the hardships tips decidedly in Star Coal's favor.

CONCLUSIONS

From the foregoing, it is apparent that: (1) Star Coal has satisfied both the Surface Mining Act's statutory standards and the Eighth Circuit's alternate standards for issuing a preliminary injunction in respect to the Act's requirement that a civil penalty be prepaid into escrow as a condition of gaining a hearing; (2) Star Coal has satisfied both the Surface Mining Act's statutory standards and the Eighth Circuit's traditional standards and the Eighth Circuit's alternate standards for issuing a preliminary injunction in respect to Violation No. 1 of Notice of Violation No. N80-4-1-1; and (3) Star Coal has failed to satisfy the Surface Mining Act's standards or the Eighth Circuit's traditional standards or the Eighth Circuit's alternate standards for issuing other preliminary injunctive relief sought by Star Coal.

ORDER

IT IS ORDERED that the defendants are enjoined during the pendency of this litigation from:

(1) enforcing in any manner whatsoever Violation No. 1 of Notice of Violation No. N80-4-1-1 issued to plaintiff

Star Coal Co. on January 24, 1980, by Michael C. Wolfrom; and

(2) enforcing the requirement of section 518(c) of the Surface Mining Act, 30 U.S.C. §1268(c), that a person charged with a violation who wishes to contest either the amount of the penalty or the fact of the violation forward the proposed amount of the penalty to the Secretary for placement in an escrow account.

IT IS FURTHER ORDERED that plaintiff shall give security as required by Fed. R. Civ. P. 65(c) in the amount of $10,000.00.

All other preliminary injunctive relief sought by plaintiff is denied.

DATED this 13th day of February, 1980.

HAROLD D. VIETOR
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

79-171-2

STAR COAL COMPANY, PLAINTIFF,

v.

CECIL D. ANDRUS,
SECRETARY OF THE INTERIOR, ET AL., DEFENDANTS.

RULING ON MOTION TO STAY

Defendants' motion to stay order preliminarily enjoining enforcement of section 518(c) of the Surface Mining Act, and plaintiff's brief in opposition thereto, are presented to the court.

On February 13, 1980, this court filed the ruling on motion for preliminary injunction and order which, inter alia, enjoined defendants during the pendency of this litigation from enforcing the requirement of section 518(c) of the Surface Mining Act, 30 U.S.C. § 1268(c), that a person charged with a violation who wishes to contest either the amount of the penalty or the fact of the violation forward the proposed amount of the penalty to the Secretary for placement in an escrow account. On March 13 the defendants filed notice of appeal to the Supreme Court of the United States and they filed their motion to stay on April 10.

The motion to stay is based on the March 17 order of the United States Supreme Court staying the final decision of

the United States District Court for the Western District of Virginia in the case of *Virginia Surface Mining and Reclamation Ass'n, Inc. v. Andrus*, No. 78-0244-B (W.D. Va. Jan. 3, 1980). The stayed *Virginia* injunction was so broad that it virtually prohibited the Secretary from exercising any of his statutory enforcement powers in respect to alleged violations of the Surface Mining Act, and the stay was granted in response to the Secretary's urging that unless granted there could be irreparable harm to the environment.

This court noted at page 20 of its ruling on motion for preliminary injunction and order: "There would be no adverse effects to the public or environment if enforcement of the provision requiring prepayment of civil penalties into escrow as a condition of gaining a hearing were preliminarily enjoined." Defendants' motion for stay and their memorandum in support thereof fail to allege or demonstrate in any way how this court's limited injunction prohibiting enforcement of the prepayment requirement of section 518(c) of the Surface Mining Act will adversely affect the public or the environment. The court fails to perceive any mischief that would result from keeping the injunction in effect during the pendency of the appeal. On the other hand, if the court stayed the injunction the plaintiff would, as a practical matter, lose the preliminary injunctive relief to which the court has found it is entitled. *See* 11 Wright and Miller, Federal Practice and Procedure § 2904.

The defendants' motion for stay is denied.

DATED this 21st day of April, 1980.

/s/ _____

HAROLD D. VIETOR
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 79-171-2

STAR COAL COMPANY, PLAINTIFF,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., DEFENDANT.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Cecil D. Andrus, Secretary of the Interior, et al., Defendants in the above-named case, appeal to the Supreme Court of the United States from the Ruling on Motion for Preliminary Injunction and Order entered in this action on the 13th day of February, 1980.

This appeal is taken pursuant to Title 28, U.S.C. Sections 1252 and 2101.

Respectfully submitted,

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Filed March 13, 1980

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Section 518 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1268, provides:

> (a) In the enforcement of a Federal program or Federal lands program, or during Federal enforcement pursuant to section 502 or during Federal enforcement of a State program pursuant to section 521 of this Act, any permittee who violates any permit condition or who violates any other provision of this title, may be assessed a civil penalty by the Secretary, except that if such violation leads to the issuance of a cessation order under section 521, the civil penalty shall be assessed. Such penalty shall not exceed $5,000 for each violation. Each day of continuing violation may be deemed a separate violation for purposes of penalty assessments. In determining the amount of the penalty, consideration shall be given to the permittee's history of previous violations at the particular surface coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether the permittee was negligent; and the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation.
>
> (b) A civil penalty shall be assessed by the Secretary only after the person charged with a violation described under subsection (a) of this section has been given an opportunity for a public hearing. Where such a public hearing has been held, the Secretary shall make findings of fact, and he shall issue a written de-

cision as to the occurrence of the violation and the amount of the penalty which is warranted, incorporating, when appropriate, an order therein requiring that the penalty be paid. When appropriate, the Secretary shall consolidate such hearings with other proceedings under section 521 of this Act. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code. Where the person charged with such a violation fails to avail himself of the opportunity for a public hearing, a civil penalty shall be assessed by the Secretary after the Secretary has determined that a violation did occur, and the amount of the penalty which is warranted, and has issued an order requiring that the penalty be paid.

(c) Upon the issuance of a notice or order charging that a violation of the Act has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty days remit the appropriate amount to the person, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

(d) Civil penalties owed under this Act, may be recovered in a civil action brought by the Attorney General at the request of the Secretary in any appropriate district court of the United States.

(e) Any person who willfully and knowingly violates a condition of a permit issued pursuant to a Fed-

eral program, a Federal lands program or Federal enforcement pursuant to section 502 or during Federal enforcement of a State program pursuant to section 521 of this Act or fails or refuses to comply with any order issued under section 521 or section 526 of this Act, or any order incorporated in a final decision issued by the Secretary under this Act, except an order incorporated in a decision issued under subsection (b) of this section or section 704 of this Act, shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than one year or both.

(f) Whenever a corporate permittee violates a condition of a permit issued pursuant to a Federal program, a Federal lands program or Federal enforcement pursuant to section 502 or Federal enforcement of a State program pursuant to section 521 of this Act or fails or refuses to comply with any order issued under section 521 of this Act, or any order incorporated in a final decision issued by the Secretary under this Act except an order incorporated in a decision issued under subsection (b) of this section or section 703 of this Act, any director, officer, or agent of such corporation who willfully and knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (e) of this section.

(g) Whoever knowingly makes any false statement, representation, or certification, or knowingly fails to make any statement, representation, or certification in any application, record, report, plant, or other document filed or required to be maintained pursuant to a Federal program or a Federal lands program or any order of decision issued by the Secretary under this Act, shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than one year or both.

(h) Any operator who fails to correct a violation for which a citation has been issued under section 521(a)

within the periods permitted for its correction (which period shall not end until the entry of a final order by the Secretary, in the case of any review proceedings under section 525 initiated by the operator wherein the Secretary orders, after an expedited hearing, the suspension of the abatement requirements of the citation after determining that the operator will suffer irreparable loss or damage from the application of those requirements, or until the entry of an order of the court, in the case of any review proceedings under section 526 initiated by the operator wherein the court orders the suspension of the abatement requirements of the citation), shall be assessed a civil penalty of not less than $750 for each day during which such failure or violation continues.

(i) As a condition of approval of any State program submitted pursuant to section 503 of this Act, the civil and criminal penalty provisions thereof shall, at a minimum, incorporate penalties no less stringent than those set forth in this section, and shall contain the same or similar procedural requirements relating thereto. Nothing herein shall be construed so as to eliminate any additional enforcement right or procedures which are available under State law to a State regulatory authority but which are not specifically enumerated herein.

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MICHAEL RODAK, JR

No. 80-49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, et al.,

Appellants,

v.

STAR COAL COMPANY,

Appellee.

On Appeal From the United States District Court For The Southern District of Iowa

MOTION TO AFFIRM

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TABLE OF CONTENTS

	PAGE
MOTION TO AFFIRM	1
STATEMENT OF THE CASE	1
REASONS FOR AFFIRMANCE	2
1. THE DISTRICT COURT PROPERLY RULED THAT SECTION 518 WHICH REQUIRES A MINE OPERATOR CHARGED WITH A VIOLATION OF THE ACT TO PURCHASE DUE PROCESS BY PREPAYING THE PROPOSED CIVIL PENALTY IN ORDER TO OBTAIN A HEARING IS UNCONSTITUTIONAL AND ENJOINED ITS ENFORCEMENT	2
CONCLUSION	7

TABLE OF AUTHORITIES

Cases

	Page
Fuentes v. Shevin, 407 U.S. 67 (1972)	6
Mathews v. Eldridge, 424 U.S. 319, 335 (1975)	4

Constitution, Statutes and Regulations

United States Constitution: [JS App. at 37a]: Fifth Amendment	6
Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 30 U.S.C. §1201 et seq.:	
Section 518, 30 U.S.C. §1268 [JS App. at 37a]	3
Section 518(c), 30 U.S.C. §1268(c) [JS App. at 38a]	4
Section 518(e), 30 U.S.C. §1268(e) [JS App. at 38a & 39a]	4
Section 521, 30 U.S.C. §1271	4
Section 701(8), 30 U.S.C. §1291(8)	3
30 C.F.R. §700.5	3

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MOTION TO AFFIRM

Appellee, Star Coal Company, respectfully moves the Court pursuant to Rule 16 to affirm the judgment of the United States District Court for the Southern District of Iowa upon the ground that the decision and judgment of the trial court is judicially correct, and the questions presented by Appellants are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

The Appellants' Jurisdictional Statement fully sets forth the decision of the trial court below, the basis for

jurisdiction and the questions presented in this appeal. They will not be repeated.

REASONS FOR AFFIRMANCE

1

THE DISTRICT COURT PROPERLY RULED THAT SECTION 518 WHICH REQUIRES A MINE OPERATOR CHARGED WITH A VIOLATION OF THE ACT TO PURCHASE DUE PROCESS BY PREPAYING THE PROPOSED CIVIL PENALTY IN ORDER TO OBTAIN A HEARING IS UNCONSTITUTIONAL AND ENJOINED ITS ENFORCEMENT.

The evidence adduced at the hearing shows that Star Coal Company has an excellent past record of reclamation and environmental protection and that if all coal miners in the past had shared Star Coal Company's concern for the environment, Congress might not have deemed it necessary to enact a thoroughly regulatory law as the Surface Mining Act. (Jurisdictional Statement, p. 24a). The Court found that there would be no adverse effects to the public nor to the environment if enforcement of the provisions requiring prepayment of civil penalties into escrow as a condition of gaining a hearing were preliminarily enjoined.

The inspectors at Star Coal Company made subjective decisions concerning the risk of harm to the employees operating in the pit area, and under circumstances where reasonable men would certainly differ. In 35 years of experience using explosives, not one single injury had occurred. §701(8) of the Act defines the threat of "imminent danger to the health and safety of the public" as the existence of conditions that could:

> "reasonably be expected to cause substantial physical harm to persons outside the permit area before such conditions, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected

> to the same conditions or practices giving rise to the peril, would not expose himself or herself to the danger during the time necessary for the abatement."

30 U.S.C. §1291(8). The definition of "significant, imminent environmental harm to land, air, or water resources," codified in 30 C.F.R. §700.5, speaks in terms of "adverse impact" which may be "reasonably expected to cause harm before the end of the abatement period." These standards appear to be well designed to protect the public and the environment, but leave the ultimate decision up to the individual inspector who must use his judgment, based on his concepts of the function of the Act, to decide whether an operation should be shut down. Government field inspectors do not necessarily have the ideals and standards to which persons in positions of great power and responsibility should subscribe. The question of whether due process will be afforded to the affected parties should not be approached from the angle that the officials in charge will bend over backwards to protect these parties, but rather should be viewed from the perspective of preventing people from abusing the process. This harsh censure is the result of the abuses to which this system has already been put.

Section 518 of the Act, 30 U.S.C. §1268, provides for civil and criminal penalties. It reads in relevant part:

> "[A]ny permittee who violates any permit condition or who violates any other provision of this subchapter, may be assessed a civil penalty by the Secretary, except that if such violation leads to the issuance of a *cessation order* under section 1271 of this title [§521 of the Act], the *civil penalty shall be assessed.*"

The penalties that may be assessed are exceedingly harsh, providing for an assessment up to Five Thousand Dollars ($5000) for each violation and for each day of continuing violation to be deemed a separate violation within the discretion of the Secretary. If a cessation order

under §521 is issued, the Secretary is compelled to impose civil penalties. Section 518(c) further provides that the failure to pay the penalty will result in a waiver of all legal rights to contest the violation of penalty amount. 30 U.S.C. §1268(c). Section 518(e) is the criminal portion of the penalty provisions and provides that if an operator fails to comply with the cessation order entered under §521, he is subject to be fined not more than Ten Thousand Dollars ($10,000) and sentenced to prison for not more than one year or both. 30 U.S.C. §1268(e).

Reading the relevant sections of the Act together, it is apparent that a cessation order can be given by an inspector in the field without any hearing. This then leads to the mandatory assessment of a civil penalty; before the expiration of the thirty days in which an operator is entitled to a hearing, he may be subject to civil penalties in the amount of One Hundred Fifty Thousand Dollars ($150,000.00), without having had a hearing of any kind.

The power of the appointed officials of the Office of Surface Mining to close down Appellee's legitimate business purely at their whim creates a condition where the power to regulate is also the power to destroy. Appellee's due process guarantees under the Fifth Amendment have greatly suffered.

The question of the degree of due process required is determined by looking to three factors this Court set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1975):

> "First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved in the fiscal and administrative burdens that the additional or substitute requirements would entail."

While the private interests are pecuniary in nature, there is a substantial likelihood of irreparable harm if the implemented procedures are followed. The margin of success in a small surface coal mining operation is often narrow. The halting of such an operation for even a day may lead to its economic collapse. On the other hand, there is a strong public interest in allowing the issuance of cessation orders when there is imminent danger to the health or safety of the public or when there is threat of significant imminent environmental harm to land, air, or water resources. There is no reason, however, why a matter of this kind cannot be presented for a temporary restraining order before a United States District Court Judge, a Federal Magistrate, or an Administrative Law Judge within two hours' notice.

The requirements of due process are not fulfilled by the current standards of the Act, under which summary administrative justice is meted out and the administrative review procedures do little to fill the void to afford Appellee any relief from suffering from operation of a cessation order or heavy penalties accompanying violation notices.

The "refund with interest" provision does not adequately protect mine operators for three reasons. First, it ties up needed capital, which is not cured by the Secretary's regulation providing for a "conference" before the proposed penalty must be paid into escrow. The hearing is before the prosecutor, who alleged that there was a violation in the first instance. Secondly, the interest recoverable is substantially below the prime rate, and in light of the fact that penalties may require several years to litigate to conclusion, the mine operator is economically coerced to give up his right to contest the violation and the amount. Thirdly, there is no provision for payment of reasonable attorney fees in the event the coal company is successful in recovering money which should not have been placed in escrow in the first place. Unlike award of

attorney fees authorized in other civil rights cases, there is no such provision for any potential abuse of process in the Surface Mining Act. This leaves the mine operator with an option to suffer a loss of his property without due process by abandoning his right to contest, or to expend more money than the penalty on attorney fees to get it back. The tool selected to pressure mine operators to make unwarranted penalty payments in order to continue their operations clearly violates procedural due process guarantees.

In *Fuentes v. Shevin*, 407 US 67 (1972), the Court said, pp. 570 and 571:

> "...If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. *But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.* 'This Court has not...embraced the general proposition that a wrong may be done if it can be undone.'..." (Emphasis added).

The requirement of prepayment of penalties or face the threat of continued daily monetary losses if the miner does not discontinue the alleged violation has the same effect as a cessation order, and constitutes a violation of the Due Process Clause.

CONCLUSION

The District Court's decision and judgment is correct in all respects and should be affirmed.

Respectfully submitted,

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